SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 121

S. Mayner Wallace, *Petitioner* vs. Johanna F. Fiske, *et als.* — No. 122

Petitioner's Petition for Rehearing or Reconsideration of the Denial of Certiorari as Being Out of Time

(Containing, as an APPENDIX hereto, a printed copy of petitioner's typewritten Petition and Brief for Certiorari docketed with petitioner's verified printed Motion for leave to dispense with the printing of unnecessary portions of the record below)

on

Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

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Case Cited

Montana Min. Co. v. St. Louis Min. & Mill. Co. and Montana Min. Co. v. St. Louis Min. & Mill. Co., 186 U. S. 24, 30-32 ..... 4, 5, 6

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MAY IT PLEASE THE COURT:

Petitioner, S. Mayner Wallace, respectfully petitions, upon the grounds below specified, for a rehearing or a reconsideration of the orders, in the above entitled causes, denying his Petition for Certiorari upon the view that the application therefor was not made within the three months limited by 28 U. S. C. sec. 350.

That Petition presented the question (apparently of first impression) whether, under the FEDERAL RULES OF CIVIL PROCEDURE, a party may effectually give notice of appeal from a District Court to a Circuit Court of Appeals within the first 10 days after judgment during which time an adversary party is now accorded the right, by those RULES, to move to amend the judgment or to move for a new trial. Stated otherwise, is any such appeal premature as being from a non-final judgment?

In the above entitled causes, petitioner, on June 2, 1941, docketed here a (typewritten) Petition and Brief for Certiorari and filed therewith his verified (printed) Motion for leave to dispense with the printing of unnecessary portions of the record below; and orders denying the two writs for which petitioner prayed (To Review Orders of the Court of Appeals Dismissing a Cross Appeal and Refusing to Dismiss the Main Appeal in One Case Then Under Review in That Court) were entered here on October 20, 1941, as follows:

> "In No. 122, the petition for writ of certiorari to review the judgment entered November 16, 1940, rehearing denied November 27, 1940, is denied on the ground that it was not filed within the time provided by law. 28 U. S. C. sec. 350.
>
> "In No. 121, the motion for leave to dispense with the filing and printing of unnecessary portions of the record is denied for the reason that the Court, upon examination of the papers submitted, finds no ground upon which a writ of certiorari should be issued. The petition for writ of certiorari is therefore also denied."

For the Court's convenience, that (typewritten) Petition and Brief for Certiorari are now printed as an attached Appendix.

The *only question* involved here is whether the time for certiorari ran from November, 1940, or from March 5, 1941, when the Court of Appeals judgment became final.

It is respectfully submitted that this Court seems inadvertently to have assumed that there were two separately reviewable rulings (one, the order dismissing the cross appeal and the other, the order refusing to dismiss the main appeal, in the same case, on Nov. 16, 1940) in the Court of Appeals—whereas, it is also respectfully submitted, there was only one reviewable judgment below (on

Jan. 31, 1941, rehearing denied Mar. 5, 1941) wherein all prior rulings, in the Court of Appeals, then became final, for the first time, and that, therefore, this application for certiorari is not out of time.

The Facts

(As shown by the short certified typewritten record on file here and upon which petitioner has moved for leave to proceed)

The Court of Appeals, on November 16, 1940, denied petitioner's motion to dismiss the main appeal by the respondents and sustained a motion by the respondents to dismiss petitioner's cross appeal in the same case; and, on November 27th following, denied a petition for a rehearing of those rulings (R. 20, 21).

That Court, on December 6, 1940, proceeded to hear said main appeal and, on January 31, 1941, affirmed the judgment from which the parties had thus appealed and, thereafter, a timely petition for rehearing was denied by the Court of Appeals on March 5, 1941 (R. 57).

This application for certiorari, to review said orders of November 16th, was, as stated, docketed here on June 2, 1941—or within the three months after said March 5th.

As demonstrating the interdependence and essential oneness of said orders of November 16th, these further facts should be pointed out:

The appealed judgment of the District Court was entered there March 30, 1940 (R. 8).

On April 9th, within 10 days thereafter, the respondents herein filed in the clerk's office of the trial court a notice of their (the said main) appeal; and 2 hrs. and 5 min. thereafter, on said April 9th, petitioner (pursuant to the

FEDERAL RULES OF CIVIL PROCEDURE) filed therein his motion to modify that judgment (R. 9, 10).

On July 25th following, that motion to modify was entertained and overruled by the District Court; and, on July 29th thereafter, petitioner gave notice of his said cross appeal from said judgment (R. 12, 13).

Those appeals, having been taken more than three months apart, could not both possibly be good. *A determination that one was good automatically determined that the other was not.*

This Court, in denying the writs prayed for, evidently assumed that the said order of November 16th, dismissing petitioner's cross appeal, was final and reviewable here notwithstanding the fact that the Court of Appeals continued the exercise of its jurisdiction over the case and, at any time up to said March 5th, might have and could have changed its view of which of the said appeals should be dismissed. All rulings of that Court were made during its November 1940 Term.

The Grounds

of this Petition for Rehearing or Reconsideration are that the orders, denying certiorari, are:

(1) Contrary to principles enunciated in the Opinion in *Montana Min. Co. v. St. Louis Min. & Mill. Co.* and *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 186 U. S. 24; and are

(2) Not in accord with other determinative factors also immediately below pointed out.

ARGUMENT

From the facts aforesaid, it is respectfully submitted that neither of the said two orders of November 16, 1940, in the Court of Appeals, was final or reviewable here before March 5, 1941; and that, in the light of those facts, this Court's Opinion, in Montana Min. Co. v. St. Louis Min. & Mill Co. and Same v. Same, 186 U. S. 24, 30-32, urges the reconsideration for which the petitioner is praying

Obviously, the order of the Court of Appeals, refusing to dismiss the main appeal, was not reviewable here until after that Court had proceeded to its final judgment.

And this Court would not have reviewed the other order (dismissing the cross appeal) in that Court in the absence of an application for the review here of that first mentioned order also; for each order was part of one entire ruling.

Those two orders were *completely complementary* because both of the two appeals (having been taken more than three months apart) could not possibly be valid—for the sustension of either one *necessarily* meant the dismissal of the other.

The Court of Appeals would, of course, have been in error in thereafter affirming the judgment as that Court did (rather than to have dismissed the main appeal) had this Court, in the meanwhile, reversed that Court's ruling on the validity of said cross appeal.

Suppose—if your Honors please—the Court of Appeals had finally reversed (rather than affirmed) said judgment and that, in the meantime, this Court had reversed that Court's ruling on the validity of said cross appeal? The

Court of Appeals would then have been required to determine an appeal from a judgment that that Court had already reversed.

In other words, it is respectfully contended that:

1. There was only one case, in the Court of Appeals, wherein there were two appeals from the same judgment of the District Court. (Possibly, some confusion has arisen because of the fact that, in the Court of Appeals, while there was—except for the cross appeal papers—only one record, the main and the cross appeal were each separately numbered.)

2. No proceeding to review that case could properly have been in this Court and in the Court of Appeals at the same time.

3. The said orders of November 16th, in the Court of Appeals, were both interlocutory until final judgment by that Court at which time that Court—certainly during the same Term—could have completely changed its view concerning the validity of both of the said appeals.

4. Any determination of the validity of said main appeal **automatically** determines the validity of said cross appeal—and *vice versa.*

It is also respectfully submitted that the soundness of the foregoing argument is conclusively demonstrated by *Montana Min. Co. v. St. Louis Min. & Mill. Co.* and *Same v. Same*, 186 U. S. 24, 30-32, where the Montana Company sued out two writs of error (Nos. 213 and 214) to review two rulings, some 5 months apart, in the same case, in a Court of Appeals.

The first of those rulings was an affirmance (on the main appeal) and the other a reversal and remand (on a cross appeal) of parts of the same judgment of a trial court.

This Court held that, in those circumstances, neither one of said rulings was final; and your Honors, in dismissing both writs of error because of the want of finality in each, observed that "part of the case" could not properly pend in this Court and in a court below at the same time and said:

> "We do not mean to intimate in the slightest degree any conclusion on the merits, but only wish to indicate embarrassments which might arise if one and the same case is treated as two separate and independent cases. (p. 31)
>
> * * *
>
> "In this case two writs of error were sued out by the Montana Company because there were two judgments rendered below, but the records on both constitute the record in one and the same case, as both writs of error in the Court of Appeals ran to the same judgment of the circuit court. (p. 31)
>
> * * *
>
> "But we are of opinion that the judgment of the Court of Appeals on the writ of error prosecuted by the St. Louis Company operated to reverse the prior judgment of affirmance, inasmuch as the Court in terms reversed the judgment of the circuit court, although imposing a limitation on the extent of the new trial awarded. Even if the Court of Appeals had power to impose that limitation, the issue so reserved deprived the first judgment of finality so far as our jurisdiction is concerned. (p. 32)
>
> * * *
>
> "Each party was defeated in some part of its contention, and each party took the case to the Court of Appeals, but the decision of that Court left a part of the case undisposed of in the court below. The judgment of reversal being before us in No. 214, we are not compelled to ignore its effect on the judgment in No. 213, and to enter-

tain one writ of error while dismissing the other. (p. 32)

* * *

"When these writs of error were taken out the judgment first rendered had ceased to be final by the operation of the second judgment, which was itself not final, and the result is that both must be dismissed." (p. 32)

In other words, if, in the instant case, the Court of Appeals, on January 31, 1941, had reversed and remanded, this Court would then have denied certiorari to review the dismissal, on November 16, 1940, of the cross appeal because of the want of finality in everything that had then been done in that Court; while the fact that the Court of Appeals affirmed cannot, of course, change the prior non-finality of the order of that Court dismissing said cross appeal.

Other cases, in this Court, to the general effect that the said orders dismissing the cross appeal and refusing to dismiss the main appeal were interlocutory and not final, appear on pages 6 and 10 of the said APPENDIX hereto.

WHEREFORE, for the reasons aforesaid, the petitioner earnestly prays for a rehearing or a reconsideration of the orders of this Court denying certiorari as being out of time and that the writs applied for be granted; and the petitioner will ever pray, *etc.*

Respectfully Submitted

S. MAYNER WALLACE
Petitioner
Pro Se

October, 1941

Certificate

The undersigned, S. Mayner Wallace, the above named petitioner, a member of the bar of this Court, hereby certifies that, in his opinion, the foregoing Petition is well founded; that same is not interposed for delay, but is presented and filed in good faith because he believes that the same ought to be granted and that a grave injustice will result to the said petitioner if this Petition is denied.

S. Mayner Wallace
Petitioner
Pro Se